IN THE

Supreme Court of the United States

OCT 31 1974

GEORGE F. GODAK, JR., CLERK

OCTOBER TERM, 1974

No. 74-510

RICHARD THORNE, a/k/a OM,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

STANLEY M. MEYER
Attorney for Petitioner
66 Court Street
Brooklyn, New York 11201

PREMINGER, MEYER & LIGHT
Of Counsel

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In The

SUPREME COURT OF THE UNITED STATES

OCTOBER, 1974 TERM

No. Misc.

- - - - - - - - - - - - - - - - - - - -

RICHARD THORNE, a/k/a "QM",

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

- - - - - - - - - - - - - - - - - - - -

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT

Petitioner, RICHARD THORNE, a/k/a "QM", respectfully prays that this Court issue a writ of certiorari to review the Judgment and Order of the United States Court of Appeals for the Second Circuit, which affirmed petitioner's conviction for Possession of Counterfeit Currency in Violation of 18 U.S.C. 472, Possession of Plates and Negatives used to print that currency in violation of 18 U.S.C. 474 and Con-

spiracy in violation of 18 U.S.C. 2.

Petitioner was convicted after a jury trial in which he represented himself, in the United States District Court for the Southern District of New York, United States District Judge Canella, presiding.

He was sentenced on May 15, 1974 to a maximum term of three years in prison. The Court of Appeals affirmed on September 30, 1974.

JURISDICTION

The jurisdiction of this Court is invoked under Title 28 United States Code, Section 1251. No opinion was written by the Court of Appeals.

QUESTIONS PRESENTED

1. Whether, after an extensive search, pursuant to a warrant, the government agents who returned to the premises seven days later, to ostensibly transport a printing press, could seize new materials in alleged open view, on the theory that the search was still ongoing.

2. Whether, considering the government's use of a federal waiver of counsel form, the failure to obtain Petitioner's signature on said form and the failure to record the advisement of Petitioner's rights during a

tape recorded interview, deprived Petitioner of due process.

3. Whether the evidence adduced, considering the injection by the prosecutor into the trial of Petitioner's religious belief was so lacking in probative value so as to deprive Petitioner of a fair trial.

STATUTES

Sec. 472 Uttering counterfeit obligations or securities

Whoever, with intent to defraud, passes, utters, publishes, or sells, or attempts to pass, utter, publish or sell, or with like intent brings into the United States or keeps in possession or conceals any falsely made, forged, counterfeited or altered obligation or other security of the United States, shall be fined not more than $5,000 or imprisoned not more than fifteen years, or both. June 25, 1948, c. 645 62 Stat. 705

Sec. 474 Plates or stones for counterfeiting obligations or securities

Whoever, having control, custody, or possession of any plate, stone, or other thing, or any part thereof, from which has been printed, or which may be prepared by direction of the Secretary of the Treasury for the purpose of printing, any obligation or other security of the United States, uses such plate, stone, or other thing, or any part thereof, or knowingly suffers the same to be used for the purpose of printing any such or similar obligation or other security, or any part thereof, except as may be printed for the use of the United States by order of the proper officer thereof; or

Whoever makes or executes any plate, stone, or

other thing in the likeness of any plate designated for the printing of such obligation or other security; or

Whoever sells any such plate, stone, or other thing, or brings into the United States any such plate, stone, or other thing, except under the direction of the Secretary of the Treasury or other proper officer, or with any other intent, in either case, than that such plate, stone, or other thing be used for the printing of the obligations or other securities of the United States; or

Whoever has in his control, custody or possession any plate, stone, or other thing in any manner made after or in the similitude of any plate, stone or other thing, from which any such obligation or other security has been printed, with intent to use such plate, stone or other thing, or to suffer the same to be used in forging or counterfeiting any such obligation or other security, or any part thereof; or

Whoever has in his possession or custody, except under authority from the Secretary of the Treasury or other proper officer, any obligation or other security made or executed, in whole or in part, after the similitude of any obligation or other security issued under the authority of the United States, with intent to sell or otherwise use the same; or

Whoever prints, photographs, or in any other manner makes or executes any engraving, photograph, print, or impression in the likeness of any such obligation or other security, or any part thereof, or sells any such engraving, photograph, print, or impression, except to the United States, or brings into the United States, any such engraving, photograph, print, or impression, except by direction of some proper officer of the United States; or

Whoever has or retains in his control or possession, after a distinctive paper has been adopted by the Secretary of the Treasury for the obligations and other securities of the United States, any similar paper adapted to the making of any such obligation or other security,

except under the authority of the Secretary of the Treasury or some other proper officer of the United States --

Shall be fined not more than $5,000. or imprisoned not more than fifteen years, or both. June 25, 1948, c. 645 Stat. 706.

FACTS

Federal agents searched a loft at 146 West 25th Street, New York City, on July 26, 1973 pursuant to a search warrant. That loft was allegedly occupied by the Petitioner, known as "OM", who was the leader of a religious group of "OM LOVERS". There was absolutely no proof that OM lived or slept at the loft, but the basic theory of the government in the case was that since the OM LOVERS were people who followed his wishes and were under his direction and control, the presence of the counterfeit plates and materials on the premises could be attributed to him.

A religious aspect was injected into the proceedings by the government, when the prosecutor, in his opening statement, told the jury that the government would prove the existence of the group, composed of a number of women with assumed names, such as LADY LOVELIGHT, LADY INSPIRATION, LADY VIRTUE and LADY CHARITY, and that OM was the leader of that group, under whose direction they

acted (4-6)*. The prosecutor also told the jury that the group believed that many institutions in our society, such as the American monetary system, were obsolete, and that they should be dispensed with, apparently a moral justification for the production of counterfeit money.

At any rate, the testimony, both at the suppresion hearing and at the trial, essentially was that an extensive search, lasting for approximately three hours was conducted at the premises by many agents working in conjunction with city police (49-51).

Nothing of great substance was first discovered except that there were printing presses on the premises, which were eventually dismantled and removed by the government. The officers secured the premises and gave a key to the landlord when they left. They returned on August 1, 1973, seven days after the search, for the purpose of considering the feasibility of moving the two large presses, even though they had already retained a moving company for that purpose. (Memorandum and Order on Suppression Motion, Briant, J. March 21, 1974, 6-7, 52-53, 4-5)

*Numerical references are to pages of the original record.

While the officers looked at a plasterboard partition located in the loft to determine whether it would have to be removed to take the presses out, one of the officers testified that he noticed a green roll of paper, allegedly in plain view, sticking out from one of the partitions. He discovered this as he looked down into a hole in the partition (Hearing, p. 20). The officer also said that the roll of paper was protruding from cement that had not hardened, although it was obvious that no one was on the premises for seven days. The observation led him to tear down the entire partition and a vast amount of counterfeit money, plates and other materials were found concealed in the wall (H21, 241-251).

The Trial Court upheld the search because the material was in plain view, taking the view that what was really involved was a seizure rather than a search (261-262). The Court of Appeals, in affirming, read into the record its opinion that the search should be viewed as continuing, so that when the agents saw the evidence they had cause to tear down the wall and recover the rest of the material.

There was also an admission issue in this case. The Petitioner was arrested on October 6, 1973, and one officer testified that while he was transporting Petitioner to headquarters, he told Petitioner not to say anything. Another agent processed him, but the Petitioner could not wait to start making incriminating statements, he was so desirous of confessing. Officer OTT testified that he also advised the Petitioner about his rights of self incrimination. Thereafter, OTT brought the Petitioner into the interview room and had Form 1737 with him, which was an adivsement to the Petitioner of his rights and had a place on it for a signature by the Petitioner. Petitioner, OM, allegedly acknowledged that he knew his rights and because he was so anxious to talk he did not bother to sign the form, although he apparently wrote on it at the top (10-11). The truth probably was that when OM saw what the form really was, he refused to sign it because he never intended to waive his rights in the first place. The officer also asked the Petitioner if he had any objection to being interviewed on tape and when Petitioner supposedly agreed, a tape interview

lasting more than one hour occurred. Lo and behold, the officer thought the tape recorder was going, but apparently the first thirty minutes of the interview was not recorded, at the very place where Petitioner was advised of his rights. The interview continued for an hour and fifteen minutes, but the agents never again advised him of his rights, so that nowhere in the record does it show that the Petitioner knew that what he said could be used against him (12-13). However, the agents testified that they had given the Petitioner his rights, and that he was so anxious to talk that he did not consider it important (40-44). Obviously, if this was true, he would have signed the card, and certainly somewhere during or after the taped interview, the agents could have read Petitioner his rights. The truth of Petitioner's claim is thus made plausible, that what he really was told was that his statements would not be used against him.

The only other evidence in the case was that the fingerprints of the Petitioner appeared on two plates or pieces of paper, although there was nothing to indicate when they had been placed there, and some hand-

writing of Petittioner was found on a currency-size piece of paper, although the nature of the statement has no relationship to the trial. The government also introduced a picture of OM, standing naked next to a printing press (T278).

No one could testify that Petitioner slept on the premises, and in fact he hardly ever visited there.

POINT I

THE SEARCH OR SEIZURE CONDUCTED IN THIS CASE WAS CLEARLY VIOLATIVE OF PETITIONER'S RIGHTS.

The facts of this case regarding the seizure by federal officers of a large amount of counterfeit currency, plates and other materials, are not complicated. As has been pointed out, the Trial Court justified the search on the basis of its conclusion that the officers observed materials in plain view, and the Court of Appeals held that the search was merely a continuation of one embarked upon seven days earlier.

The officers in this case had a search warrant for the loft premises in question and swarmed upon the premises in many numbers searching for about three

hours for evidence incounterfeiting. They found nothing of value, but when they returned seven days later, on August 1, 1973, in order to determine how to move two large printing presses, they supposedly then saw contraband in plain view which led to the seizure. The substance of the testimony was that a partition existed in the loft, but that on one side of the partition the wood portion of the wall did not go all the way up to the ceiling On this second occasion a police officer looked down into the partition and observed a roll of green paper sticking out of some wet cement. This preposterous testimony was apparently believed by the Courts below, even though it is almost incredible that the officers did not discover this evidence during the three hour search they conducted the first time, and we suggest it is practically common knowledge that cement in such an area could not possibly still be wet seven days after the first search.

At any rate, discovery of the roll of green paper led to the dismantling of the entire wall and the evidence sought to be suppressed was contained therein.

It is submitted that a novel question is presented

in this case regarding whether you can continue a search where such a long time gap occurs between the initial search and eventual seizure, especially in view of the fact that the officers had ample time to make a thorough search on the first occasion. This is not like the automobile situation which occurs generally where police make a search at the precinct rather than out in the street. In that situation, there are good security reasons why a search should be made at the precinct, and the theory has been that a search could have been made in the street, but merely postponing it does not work any great deprivation of rights. Also in that situation, there has been no opportunity to make a thorough search when the car is first encountered. In the case at bar, a similar justification cannot be relied upon, because a thorough search occurred the first time and the premises were secured and constantly in control of the police since the search. There seems to be no logical reason why the necessity of obtaining a second search warrant should be dispensed with or why this should be viewed as a continuing search. It is also a logical con-

clusion that based upon the facts of this case, the intent of the officers on the second occasion was to search and not to prepare for removal of the printing presses, since a moving company had already been engaged , and it is hard to believe what expertise the officers themselves could have had so that they would not have left the entire matter to the movers. In addition, the Trial Courts reliance on United States v. Green, 474 F.2d 1385 (5th Cir. 1973) seems to have been misplaced. Unlike that case, the removal of the roll of paper in the case at bar revealed nothing of importance and nothing further came into "plain view". If the agents felt that that roll of paper, in and of itself, constituted probable cause to justify tearing down the wall, they could have submitted the matter to the Federal Court for a decision.Nothing at all was revealed after the roll of paper was taken, so that the "plain view" doctrine would seem to be inapplicable. Indeed, the wall had to be torn down to find the evidence which was claimed to have been in plain view. The truth of the matter is probably that the roll of paper was never found inthe cement, or

even if it was, the agents merely tore down the wall based upon speculation which turned out to bear fruit. The cases of Terry v. Ohio, 392, U.S. 1 (1968) and Harris v. United States, 390 U.S. 234 (1968), relied upon below, do not seem to support the government's position.

The search warrant that justified the search of July 26, 1973 had become thoroughly satisfied because of the lengthy and extensive search made by the agents and there seems to be no doctrine to support the facts of the contention that a further search on August 1, 1973 could take for its justification the very same search warrant. Cady v. Dombrowski, 413 U.S. 433 (1973) and Coolidge v. New Hampshire, 403, U.S. 443 (1971).

POINT II

THE ADMISSIONS USED AGAINST THE PETITIONER WERE OBTAINED IN BLATANT DISREGARD OF HIS CONSTITUTIONAL RIGHTS.

The testimony regarding the obtaining of admissions from the Petitioner herein represents the most unusual series of fortuitous mishaps, or must be the product of deliberate lies on the part of the

the government agents. The government witnesses testified that Petitioner was advised of his rights in the car taking him to be processed after his arrest. In fact, the agent testified that he even told Petitioner not to answer questions, although Petitioner was apparently eager to reveal his entire role in the counterfeiting scheme. Again, while Petitioner was being processed at the precinct, he wanted to confess his sins, but was again advised of his rights. Finally, Petitioner was brought to the interview room and a waiver of rights form was presented to him by the government. The testimony was that although he seemed to sign a portion of it at the top, he was so eager to confess that he neglected, or had no time, to sign the bottom, which would have indicated his consent to waive his constitutional rights. It stretches reason to incredible length when one is asked to believe that a person who is willing to make a confession would not have signed the form that would have ended any controversy regarding the legality of obtaining that confession from him. No agent worth his salt would have omitted

obtaining the necessary signature if, indeed, the Petitioner really wanted to make the admissions he is said to have made. It is more likely that Petitioner may have intended to make these admissions and was probably told they could not be used against him. It was only when he realized what the true nature of the situation was that he decided not to incriminate himself so manifestly, and he refused to sign the card.

That view is made even stronger by the officer's testimony regarding the interview itself. We are asked to believe that the Petitioner consented to having his interview taped, and that he actually answered questions during a taped session for about one hour and fifteen minutes. We are also asked to believe the agent's testimony that Petitioner was advised of his rights at the beginning of the session, but lo and behlcld, something was wrong with the tape machine and it never recorded that portion of the interview. The agents then continued to tape the interview and relied upon their own testimony that they gave the Petitioner his waivers. How can we be expected to believe that in such a situation with such a willing confessor, the agents would

obtaining the necessary signature if, indeed, the Petitioner really wanted to make the admissions he is said to have made. It is more likely that Petitioner may have intended to make these admissions and was probably told they could not be used against him. It was only when he realized what the true nature of the situation was that he decided not to incriminate himself so manifestly, and he refused to sign the card.

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not have gotten another tape and had the Petitioner waive his rights on it, even if it came after the main interview? It is too great a coincidence to believe that the tape recorder did not work only during that portion when the Petitioner was advised of his rights, and also that the Petitioner's signature was absent from the waiver card only because he was so anxious to confess. If that were true, he most certainly would have agreed to retape the interview and would have agreed to be given his advisements and waive that matter on the recording.

POINT III

THE PETITIONER DID NOT RECEIVE A TRIAL WHICH CAME WITHIN THE CONCEPT OF DUE PROCESS BECAUSE OF THE INJECTION OF HIS BELIEFS INTO THE TRIAL BY THE PROSECUTOR.

As we have discussed in Points I and II, the basic evidence against the Petitioner arose from situations involving serious questions of the invasion of his constitutional rights. In addition, the only substantial evidence that existed against the Petitioner were fingerprints found on a piece of paper on which currency was printed and a writing of the Petitioner

on another piece of paper which was the same size as currency. It could not be established at the trial when the Petitioner's fingerprints appeared on the document or under what circumstances. The only other evidence which the prosecution used to establish control was the testimony by the superintendent that on a few occasions when matters of arrears of rent were discussed, the superintendent discussed those matters with the Petitioner. There was absolutely no direct evidence that Petitioner had any control of the premises or directed the transactions in counterfeiting. The government relied exclusively on the theory that QM was the leader of this movement and his disciples were people who were sworn to obey his commands and directives.

This issue was first inserted into this case by the prosecutor when in his opening to the jury he argued that the group was subject to the Petitioner's commands (2-5). It is submitted that this brought a religious aspect to this case, and that the effect, when one looks at the record, was to place the Petitioner on trial for his unorthodox and possibly repugnant

religious beliefs, rather than for the crime as charged. We believe that the government should have been put to prove the charges against OM through direct evidence and evidence relating solely to OM's presence on the premises, rather than a strange theory which contained the danger of putting these irrelevant and inflammatory issues before the jury.

When all of these factors are considered together, we believe that the Petitioner did not have a fair trial, and that the issues arising out of the proceeding were serious and worthy of consideration by this Court.

CONCLUSION

THE PETITION FOR CERTIORARI SHOULD BE GRANTED.

Respectfully submitted,

STANLEY M. MEYER
Attorney for Petitioner
66 Court Street
Brooklyn, New York 11201

PREMINGER, MEYER & LIGHT
OF COUNSEL

ORDER OF AFFIRMANCE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

UNITED STATES COURT OF APPEALS

For The

SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the thirtieth day of September one thousand nine hundred and seventy-four.

Present: HON. PAUL R. HAYS

HON. ROBERT P. ANDERSON

HON. WALTER R. MANSFIELD

Circuit Judges

- X

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

74-1663

v.

RICHARD THORNE, a/k/a/ OM,

Defendant-Appellant.

- X

Appeal from the United States District Court for the Southern District of New York.

[illegible] based on the trans-

ORDER OF AFFIRMANCE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

cript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO,
Clerk

By: VINCENT A. CARLIN
Chief Deputy Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-510

RICHARD THORNE, a/k/a OM, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends: (1) A plain view seizure subsequent to a lawful search was invalid; (2) his failure completely to execute a waiver form rendered his in-custody statements inadmissible; and (3) allegedly improper comment by the prosecutor deprived him of a fair trial.

Petitioner was convicted, after trial by jury in the United States District Court for the Southern District of New York, on two counts of possession of counterfeit plates, negatives, and $114,000 in counterfeit currency, in violation of 18 U.S.C. 472 and 474. He was sentenced to concurrent terms of three years' imprisonment. The court of appeals affirmed without

567-304—75——1

opinion on September 30, 1974 (Pet. App.). The petition for a writ of certiorari was not filed until October 31, 1974, and is therefore untimely under Rule 22(2) of the Rules of this Court. There is, in any event, no occasion to grant the writ.

The evidence at trial established that petitioner was the leader of a group entitled "Om Lovers" (consisting of petitioner, who was known as "Om", six women, and three children). A sixth floor loft at 146 West 25th St. in New York City was leased by "Om Lover" Sarah Young, but access to the premises was controlled by petitioner, who also arranged for rental payments. The building superintendant, Clarence Jefferson, testified that he saw petitioner in the building almost daily and believed that he and the others lived there, although Jefferson never saw them sleeping in the loft (Tr. 31, 44, 46, 115, 126).[1]

On July 26, 1973, Secret Service Agent Guy Caputo received counterfeit currency from Mrs. D. Michaux, who worked on the fifth floor of the 25th Street building and had found the currency in the fifth floor ladies' room. After investigation, Agent Caputo found about $7,000 in counterfeit currency in the air shaft vents on all floors below the sixth (Tr. 166, 167, 192, 199, 200, 202–207).

Agent Caputo obtained a search warrant for the sixth floor loft and executed it at about 6:30 p.m. on July 26th (Tr. 195–196). Among the items seized at that time were two counterfeit $10 bills, burnt counterfeit notes, sample printing papers, printing ink, two

[1] "Tr." denotes the transcript of the jury trial.

printing presses, and instruction books on how to use the presses (Tr. 302, 311, 236–237). All of these items were of the type used to print currency. With the exception of the printing presses, which weighed three tons, they were removed on the day of the search and an inventory return filed (App., *infra*, pp. 10–11).[2]

One agent remained in the loft overnight. On the 27th the locks were changed. One key was kept by the Secret Service and one given to the landlord. Thereafter, the agents did not return to the loft until August 1st and then solely to determine how to expedite the moving of the presses. While examining a makeshift wall to determine if the presses could be removed without tearing down the wall, they discovered printed currency in plain view in the interstice of the partition. Since there were other items in plain view in the crevice, which they could not reach, the agents dismantled the smaller side of the wall, uncovering more than $100,000 in counterfeit currency, both cut and uncut, along with 64 printing negatives and 57 printing plates used in the manufacture of counterfeit currency (Tr. 242–247; App., *infra*, pp. 11–12). Petitioner's fingerprints were found on two of these printing plates (Tr. 429).

1. Petitioner's first two contentions, that the district court improperly denied his motion to suppress the counterfeit currency found in the loft on August 1st and to suppress his statements to Secret Service Agents shortly after his arrest, were thoroughly con-

[2] The appendix to this memorandum contains the "Memorandum and Order" of the district court denying petitioner's suppression motions.

sidered and properly rejected in the Memorandum and Order of the district court, upon which we rely. We add only the following:

(a) Search and seizure: Petitioner makes no complaint regarding the execution of a lawful search warrant at 146 West 25th Street on July 26, 1973. Rather he contends that the inadvertent discovery of counterfeit currency and plates in the makeshift partition on August 1, 1973, constituted an illegal warrantless search.

Petitioner's contention is founded on the erroneous assumption the August 1st visit was a second search for which a separate warrant was required. The August 1st visit to the loft, although it resulted in a plain view seizure, was not a search (App., *infra*, p. 12). As the district court correctly pointed out, the Secret Service was in constructive possession of the premises on August 1st (*id.* at 10), since "officers must necessarily retain some control over the premises in which the articles are located for whatever reasonable time is required for removal of articles seized" (*id.* at 13). See *United States* v. *American Brewing Co.*, 296 Fed. 772, 777 (E.D. Pa.), and *Levin* v. *Blair*, 17 F. 2d 151, 152 (E.D. Pa.). Here, the agents retained control of the premises for only five days, which was a reasonable time in view of their responsibility for the removal of printing presses weighing approximately 6,000 pounds.

Since the agents were properly in the loft on August 1st, the inadvertent plain view discovery of the exposed currency was lawful (App., *infra*, p. 15).

See, *e.g.*, *Harris* v. *United States*, 390 U.S. 234; *Coolidge* v. *New Hampshire*, 403 U.S. 443, 446, 469. Tearing down part of the partition and seizure of additional incriminating evidence was also proper. The agents removed the plywood sheets from the partition only after they were unable to reach the exposed currency by extending their hands down into the wall (T. 2/8/74, pp. 19–21).[3]

(*b*) Petitioner's statements: The district court found that petitioner was fully advised of his constitutional rights at least three times after his arrest and that he knowingly and voluntarily waived those rights (App., *infra*, p. 9). Petitioner argues, however, that his partial execution of the waiver form demonstrated his intention not to make any statements to the authorities (Pet. 16).[4]

Petitioner cites no legal authority for this proposition and it is manifestly unsound. A written waiver is not required under *Miranda* v. *Arizona*, 384 U.S. 436, 444. Moreover, petitioner stated that he understood his rights and at no time indicated that he was unwilling to answer questions or that he wanted an attorney (App., *infra*, p. 8; T. 2/8/74, p. 30). Judging the totality of circumstances surrounding petitioner's in-custody statements, the district court correctly found that petitioner waived his rights. See *United States* v. *McNeil*, 433 F. 2d 1109, 1113 (C.A.D.C.); *United States*

[3] "T." denotes the transcript of the suppression hearing.

[4] Petitioner signed the "Warning of Rights" portion of Secret Service Form 1737, but did not execute the "Waiver" portion on the bottom half of the form (Gov't Exh. 10).

v. *Cassino*, 467 F. 2d 610, 620 n. 30 (C.A. 2), certiorari denied, 410 U.S. 928; *United States* v. *Speaks*, 453 F. 2d 966 (C.A. 1), certiorari denied, 405 U.S. 1071; *United States* v. *Crisp*, 435 F. 2d 354 (C.A. 7), certiorari denied, 402 U.S. 947; *Klinger* v. *United States*, 409 F. 2d 299 (C.A. 8), certiorari denied, 396 U.S. 859.

2. Petitioner advances for the first time in his petition a claim that he was prejudiced by the prosecution's opening statement to the jury concerning petitioner's position as leader of the "Om Lovers" (Tr. 2–5; Pet. 18). Since this contention was not raised in the courts below, it should not be considered by this Court. *Lawn* v. *United States*, 355 U.S. 339, 362 n. 16. In any event, the remarks were proper as a summary of what the government intended to prove concerning the relationship among the parties who occupied the loft where the counterfeit currency and paraphernalia were seized. See *Butler* v. *United States*, 191 F. 2d 433, 435 (C.A. 4). In this context the comments were not prejudicial, especially in light of petitioner's opening statement about himself as "Om" (Tr. 13).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JANUARY 1975.

APPENDIX

United States District Court Southern District of New York

(73 Cr. 976–CLB; 73–3407)

UNITED STATES OF AMERICA

v.

NANCY LEE NAYLOR, DEFENDANT

(73 Cr. 983–CLB; 73–3414)

UNITED STATES OF AMERICA

v.

OM (INDICTED AS RICHARD THORNE), DEFENDANT

MEMORANDUM AND ORDER

BRIEANT, J. Defendant Om has been charged in a two-count indictment with possession of counterfeit United States obligations and articles used for counterfeiting, in violation of 18 U.S.C. §§ 472 and 474. Defendant Naylor has been charged in a one-count indictment with possession of articles used for counterfeiting, in violation of 18 U.S.C. § 474.

By notice dated January 22, 1974, defendant Naylor moved, pursuant to Rule 41(f), F.R. Crim. P., for an order suppressing evidence, consisting of counterfeit currency, plates and plate makers seized by Secret Service agents on August 1, 1973. By notice dated January 28, 1974, defendant Om joined in defendant Naylor's motion to suppress and also moved to suppress

statements he made at the time of his arrest on October 6, 1973. A hearing was commenced on February 4, 1974, continued on February 8th and completed on February 13th.

Dealing first with the statements sought to be suppressed by defendant Om, these statements, as noted above, were made on October 6, 1973. After his arrest, defendant was taken to the United States Secret Service office at 90 Church Street, New York City. Upon his arrival, he was asked by Agent Ott if he had been warned of his rights, and defendant replied that he had been (Tr. p. 41). Nevertheless, since Om seemed inclined to talk, Agent Ott repeated the *Miranda* warnings because Om "began talking about counterfeiting" (Tr. p. 36). Agent Ott next presented Om with Secret Service Form 1937, entitled "Warning and Consent to Speak," containing *inter alia,* the requisite *Miranda* warnings, which defendant read, stated he understood, and signed (Tr. p. 37). Defendant did not indicate that he wanted a lawyer, nor that he was unwilling to answer questions (Tr. p. 40).

After routine processing procedures (fingerprinting, photographing and taking a personal history), Agent Ott brought the defendant to the arresting officer and agent in charge, Agent Sheafe. In Agent Ott's presence, Agent Sheafe also gave defendant *Miranda* warnings.

Despite the fact that defendant was apprised of his rights at least three times, defendant contends that his statements were not voluntarily given because he did not sign the second part of Secret Service Form 1937, which is entitled "Waiver" and reads as follows:

> I do not want a lawyer at this time. I understand and know what I am doing. No promises or threats have been made to me and no pressure or force of any kind has been used against

> me. I hereby voluntarily and intentionally waive my rights and I am willing to make a statement and answer questions.

Agent Ott's signature appears on the signature line below this statement, was crossed out, and the Agent signed the certification at the bottom of the form which states that the Agent read the document to the defendant, who also read it, and signed it. Agent Ott testified, and I find, that he signed on the wrong line (at the place intended for Om), inadvertently and immediately corrected his error (Tr. p. 38). Agent Ott testified, and I find, that as a "general rule," the waiver as well as the warning portions of the form are signed, but he does not "instruct" defendants to sign either. In this instance, the Agent did not "instruct" Om to sign anything, nor did defendant expressly decline to sign the waiver (Tr. pp. 42–44).

The Court finds no constitutional or evidentiary significance in the sequence of events concerning Secret Service Form 1937. It is not crucial to the issue of the voluntariness of defendant's statements that he did not sign the waiver portion of the form. A finding of waiver is based on defendant's conduct in light of all the surrounding facts and circumstances.

The Court finds that defendant was advised of his constitutional rights at least three times, and acknowledged verbally, and in writing, that he was so advised, that he understood his rights and waived his rights to have counsel present, and remain silent, and consented, voluntarily and knowingly, to make a statement. I find beyond a reasonable doubt, that the statements or admissions sought to be suppressed were voluntarily made after defendant had been fully advised of his constitutional rights, and after a knowledgable waiver as aforesaid.

Turning to the motion to suppress in which both defendants have joined, we note first that a search warrant was issued by Magistrate Hartenstine of this Court on July 26, 1973, authorizing search of a loft at 146 West 25th Street, New York City. A return was made and filed on July 27, 1973, and an inventory of items seized was filed. The motion to suppress is not directed to the inventory of items seized which was filed on July 27th. The items sought to be suppressed were seized on August 1, 1973, and are listed in an undated "supplementary inventory."

Two of the items listed in the July 27th inventory as having been seized were printing presses. The larger of the two presses was described correctly by Agent Caputo as being, "about six and one-half to seven feet tall, about five feet long and about four feet wide. The smaller press was about five to five and a half feet high, about three and a half to four feet long and about three feet wide." The presses together weighed about three tons. From July 26th at least through August 10th, when the presses were removed by a private licensed rigger employed by the Government, apparently no one was occupying the premises.

Because of the size of the printing machines, the agents were unable to take them out of the loft physically on July 26th. Accordingly, to protect the evidence, two Secret Service agents remained on the premises until the next day. The lock was then changed. One key was given to the landlord and the other retained by the Secret Service (Tr. p. 12), so that in effect the premises remained padlocked and in the actual or constructive possession of the Government, at least until August 10th.

Agent Sheafe attempted as expeditiously as possible to have Santini Brothers, a reputable local moving company, employed regularly by the Government for

such work, take the presses out of the loft, but that company was unable to do so until about August 10th.

Pursuant to his conversation with the Santini firm, and in order to expedite its work, Agent Sheafe and two other agents went to the loft on August 1st. The purpose of their visit was to study and consider the feasibility and best way of moving the presses. This action on their part was particularly necessary with respect to the larger press, which was located behind a recently constructed wall and would not fit through the doorways which led through the wall to the elevator which served the loft.

The wall consisted of plywood sheets from floor to ceiling on one side, nailed to 2" x 4" studs, and plywood sheets from the floor to a height of four feet on the other side. This left verticle interstices between the studs, and between the sheets, at a height of four feet, and below eye level.

While Agent Caputo was inspecting the wall to see if a part of it could be cut out to facilitate removal of the press, without damaging the building, he saw a roll of paper imprinted in green sticking out of one of the interstices. Although he could not then tell merely from this observation, that this was counterfeit currency, we think he was justified in inspecting the roll of paper.

Counterfeit money had already been discovered on the premises in great quantity, and it would be reasonable to infer that such a roll of paper, partially hidden or secreted inside the wall also might be counterfeit money. The roll of paper was in fact counterfeit United States currency, not yet cut up in bill size (Tr. p. 16). It measured about 18 or 24 inches in length, or so appeared to the Court at the hearing.

Apparently cement had been poured into the space between the plywood sheets and water had been poured

in on top of the cement. Some of the cement had solidified, some appeared wet, and some had remained in powder form. This was an indication, readily visible, that attempt might have been made to cement contraband into the wall. After lifting out the first roll of counterfeit currency, the agents removed the plywood and the cement. This disclosed additional counterfeiting paraphernalia and additional counterfeit currency in substantial quantity, which defendants are seeking to suppress.

Agent Caputo testified, and I find, that he had not looked at the wall on July 26th, while executing the search warrant, and his purpose in inspecting it on August 1st was related solely to determining how best to remove the presses constructively seized on July 26th, when he padlocked the loft. The initial roll of paper Caputo observed was not visible from any other place in the room but was clearly visible when he looked down into the wall for the aforementioned purpose (Tr. p. 20).

The agents decided either the press or the wall would have to be dismantled to remove the larger press.

Defendants argue that by August 1st, the search warrant issued on July 26th had become "functus officio," and after having filed the return on July 27th, the officers had no authority to conduct a "second search." *Cf. Cady* v. *Dombrowski,* 413 U.S. 433 (1973).

I find there was no "search" on August 1st, but only a "seizure", and therefore we need not discuss the question of when the authority granted by the July 26th search warrant expired.

"That which is in plain view is not the product of a search." *U.S.* v. *Barone,* 330 F. 2d 543, 544 (2d Cir. 1974). See also *U.S.* v. *Miller,* 356 F. 2d 63, 69 (5th Cir. 1966), and cases cited therein. Once it is estab-

lished that law enforcement officials were lawfully within view of the evidence, the question becomes one of whether the seizure was lawful.

The question presented falls squarely within the "plain view" doctrine. See *Harris* v. *United States,* 390 U.S. 234 (1968); *Coolidge* v. *New Hampshire,* 403 U.S. 443 (1971).

Two separate evils are prohibited by the Fourth Amendment: unreasonable searches and unreasonable seizures. The first inquiry, then, is whether the Secret Service agents were reasonably and lawfully in the loft on August 1st, or were engaged in unlawful conduct. Their initial intrusion into a constitutionally protected area (part of the loft was a residence of one Chong, also indicted for counterfeiting) was made under a lawful search warrant. The invasion of privacy thus authorized was not increased by the fact that the agents returned to the loft to consider and decide how to remove two large unwieldly printing presses, already constructively seized under a properly issued and executed search warrant, by the act of changing the lock.

Modern cases assume without citation of authority that in order to execute a search warrant, the officers must necessarily retain some control over the premises in which the articles are located for whatever reasonable time is required for removal of articles seized. Numerous cases affecting seizure of bulky or weighty articles arising out of violations of the National Prohibition Act are clear on the point that the courts will not intervene unless law enforcement authorities act unreasonably. An illegal vat, still or whiskey rectifier surely could not be dismantled and hauled away with any more dispatch than could two large printing presses. In *United States* v. *American Brewing Co.,*

296 F. 772 (E.D. Pa. 1924) the district court held that the prohibition officers "had no right to remain in the defendant's premises longer than was reasonably necessary to make a search and remove such personal property as they were authorized to seize." 296 F. at p. 777. See also *Levin* v. *Blair*, 17 F. 2d 151 (E.D. Pa. 1927), in which the Court stated at p. 152:

> "The prohibition authorities had made use of this search warrant as an authority to seize and hold possession of the real estate premises. [*T*]*he officers have no right* * * * *to remain on the premises for a longer time than is necessary to execute the writ.*" [Italics ours.]

These illustrative cases show the converse, that a right exists to remain in the search premises for a sufficient time to execute the writ and effect the seizure. Here, on August 1st, that period of time necessary to effect the seizure of the presses, and their removal had not expired. Accordingly, the presence of the agents on that date in the loft was lawful.

As the Supreme Court stated in *Coolidge, supra,* at p. 466:

> [P]lain view *alone* is never enough to justify the warrantless seizure of evidence * * *. What the plain view cases have in common is that the police officer had a prior justification for an intrusion in the course of which he came inadvertently across a piece of evidence incriminating the accused.

The Secret Service agents here had a prior justification for being in the loft, in furtherance of their duty to remove the presses, and therefore were not conducting an unlawful search.

Their discovery of the evidence was fortuitous, and not the result of an unauthorized exploratory search.

See *Coolidge, supra,* at p. 469. There is no evidence in the record to contradict the testimony of Agents Sheafe and Caputo that their only purpose in inspecting the wall, and looking at the space between the plywood sheets was to determine the best way to remove the printing presses. The agents' conduct demonstrates that they recognized and accepted the limited authority they had to seize the contraband. They did not conduct a search of the entire premises on August 1st, but limited their activities to the wall where the counterfeit roll had been exposed to view.

Having extricated the first, visible, roll of counterfeit currency from the wall, the agents were not required to halt their investigation to obtain a further search warrant. While the facts are somewhat dissimilar, we believe *United States* v. *Green,* 474 F. 2d 1385 (5th Cir. 1973) supports this finding. There a fire marshal investigating the cause of a fire uncovered what he recognized as a counterfeiting plate. When he removed this plate, he uncovered others, which defendant sought to have suppressed on the ground that the marshal should first have obtained a search warrant. The Court held (p. 1389):

> [T]he Fourth Amendment does not require that [the fire marshal] have halted his investigation once the first counterfeiting plate was uncovered and have obtained a search warrant before continuing. The activity that led to the discovery of the plates was within the scope of the justification for [the marshal's] intrusion.

To require a second warrant to seize contraband which inadvertently came within the plain view of the agents performing duties they were authorized to perform would be just as

> * * * senseless as requiring an officer to interrupt a lawful search to stop and procure a warrant for evidence he has already inadvertently found. *Terry* v. *Ohio,* 1968, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 889; *Harris* v. *United States,* 1968, 390 U.S. 234, 88 S. Ct. 992, 19 L. Ed. 1067.
> 474 F. 2d at 1390.

The motions are in all respects denied.

So ordered.

Dated: New York, New York; March 21, 1974.

Charles L. Brieant, Jr.

CHARLES L. BRIEANT, Jr.,

U.S.D.J.